UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Mark E. DAVIS 611132

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2520

Mark E. DAVIS

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By order dated 24 July 1990, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's Merchant Mariner's License outright for three months with an additional suspension of six months remitted on 12 months probation. This order was issued upon finding proved a charge of negligence supported by a single specification.

The charge alleged that Appellant, while serving under the authority of his license as master of the S/V TEREGRAM, did, on or about 17 May 1990, fail to ensure that all passengers were onboard the vessel upon departure from Molokini /crater, Hawaii, thereby leaving one passenger in the water. The hearing was held at Honolulu, Hawaii on 12 June 1990.

Appellant appeared at the hearing and was represented by professional counsel. Appellant entered, in accordance with 46 C.F.R. SS5.527(a), an answer of deny to the charge and specification.

A second specification supporting the charge of negligence was found not proved by the Administrative Law Judge.

The Investigating Officer introduced in evidence five exhibits and called four witnesses.

Appellant introduced one exhibit into evidence and called one witness. Appellant testified under oath in his own behalf.

The Administrative Law Judge issued the Order in open hearing on 12 June 1990. Appellant filed a notice of appeal on 13 June 1990. (The written Decision and Order was signed on 24 July 1990 and was served on Appellant on 31 July 1990). Appellant received the transcript of the proceedings on 26 September 1990, and filed his appellate brief on that same date. Accordingly, this appeal is timely and properly before the Vice Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant was serving under the authority of the above-captioned Merchant Mariner's License. Appellant's license authorized him to serve as: Master of near coastal, auxiliary sail vessels of not more than 100 gross tons.

The S/V TEREGRAM, O.N. D228623 is a wooden hull auxiliary sail vessel of 21 gross tons and 49 feet in length.

On 16 May 1990, Appellant, assisted by two deckhands, operated the S/V TEREGRAM from the island of Maui to the Molokini Crater area in Maalaea Bay, Hawaii. The vessel carried 31 paying passengers for a snorkeling/diving trip.

Upon arriving at the snorkeling area at approximately 1000, Appellant advised all passengers of known dangers regarding wind, wave action and marine life. He also advised all passengers that they

should not snorkel alone and should remain within visual distance of the vessel. Appellant further advised all passengers that because of a vacillating wind line that could adversely affect the vessel, all passengers were to return to the S/V TEREGRAM when he sounded a whistle signal. Appellant then sounded the whistle signal as an example for the benefit of the passengers.

After approximately two hours, Appellant sounded the whistle for all passengers in the water to return to the vessel due to the approaching wind line. The water was scanned for passengers and subsequently, when all passengers were believed aboard, Appellant directed a deckhand to conduct a head count. No specific instructions were given on the method of conducting the head count. The deckhand erroneously counted 31 passengers advising Appellant that all passengers were aboard the vessel.

The S/V TEREGRAM returned to port at approximately 1330, at which time it was discovered that the head count was in error and that a passenger had been left in the water. A report was subsequently made to the Coast Guard who found the passenger alive on Molokini Island at approximately 1612 that same day.

Appearance: Penny J. Brown, Esq., Alcantara & Frame, Pioneer Plaza, Suite 1100, 900 Fort Street Mall, Honolulu, HI 96813.

BASES OF APPEAL

Appellant asserts that the evidence does not support the finding of proved to the charge and specification of negligence. In the alternative, Appellant urges that the sanction should be mitigated to a warning or a full remission of the suspension because the sanction imposed is too severe.

OPINION

Appellant asserts that his conduct did not amount to negligence. Appellant urges that he took all reasonable and prudent precautions to ensure that all passengers were on board the S/V TEREGRAM, and the fact that his deckhand made a mistake cannot be imputed to Appellant

in determining negligence. I do not agree.

Appellant, in his brief, states in great detail all of those actions he took to fully advise the passengers of the dangers of the area and the necessity of returning to the vessel when the whistle was sounded. He further states that the passenger left behind was contributorily negligent in not keeping within a safe distance of the vessel, not using the "buddy system" when snorkeling, and not being attentive to the whistle signal when sounded. Appellant also states that the deckhand who took the erroneous head count was negligent.

The contributory negligence of other parties is not a viable issue or defense in Suspension and Revocation Proceedings. Appeal Decision 2492 (RATH); Appeal Decision 2478 (DUPRE); Appeal Decision 2367 (SPENCER); Appeal Decision 2308 (GRAY); Appeal Decision 2319 (PAVLEC); Appeal Decision 2400 (WIDMAN); Appeal Decision 2421 (RADER); Appeal Decision 2096 (TAYLOR); Appeal Decision 2380 (HALL).

Negligence is defined in 46 C.F.R. ÷5.29 as:

> [t]he commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.

The pivotal issue of this case is whether Appellant himself took all reasonable and prudent actions to ensure that all passengers were aboard the vessel before departing the snorkeling area. The record

provides substantial evidence that Appellant did not take such reasonable and prudent action.

The testimony of the crew reflects that at the time that the head count was taken, there was confusion on the vessel "with people running around and getting changed to get ready . . . ."

[TR p. 33].

Q Is there a procedure for making this head count?

A We just basically try to count heads. As we're standing in the cockpit, we just try to count the heads. And people usually aren't, you know, sitting down in one spot, of course. Everybody is milling about and we also have passengers further down below in the cabin. We try to count heads.

Q So basically, the passengers are moving freely about the vessel during the head count?

A Yes. [TR. p. 74].

Additionally, the record indicates that the crew was somewhat in a hurry due to the inclement weather. [TR p. 51].

Finally, the record reflects that on previous snorkeling trips, Appellant had ordered a head count be taken with all passengers sitting down on the main deck in full view, at one time. Had this method been employed, it is likely that no passenger would have been miscounted. However, on 16 May 1990, Appellant failed to issue this instruction to the passengers or to the deckhand conducting the headcount. [TR p. 76]. In fact, Appellant gave the deckhand no instructions on how to conduct the head count. [TR p. 49].

It is clear that Appellant himself had previously established a viable, orderly procedure to conduct an error-free head count. However, on this particular trip, Appellant provided no particular instructions to the crew or to the passengers to ensure that all passengers were accounted for.

Contrary to Appellant's contention, this is not a case where the negligence of the deckhand is imputed to the Master of the vessel. Here, the Master himself was remiss in not properly instructing the crew and the passengers in a proper method of conducting a head count. I find that Appellant's omission falls below the standard of a reasonable and prudent Master responsible for 31 passengers in open, unsheltered waters, with the knowledge that inclement weather was imminent.

Appellant's assertion that the sanction awarded is unfairly severe is without merit. The sanction is within the suggested range of orders set forth in 46 C.F.R. ÷5.569. Notwithstanding Appellant's previous good record, Appellant's negligent conduct could have resulted in the death of the passenger left swimming in unprotected waters. The suspension awarded by the Administrative Law Judge is reasonable under the circumstances and is neither unfair nor disproportionate to the charge of negligence found proved.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated on 24 July 1990 at Long Beach, California is AFFIRMED.

/S/
Martin H. Daniell
Vice Admiral, U. S. Coast Guard

Signed at Washington, D.C., this 7th day of February, 1991.

***** END OF DECISION NO. 2520 *****